SUPREME COURT, U. S.
APR 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1344

THE HOUSE OF VISION, INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. JOHN C. WATSON, DIRECTOR OF DEPARTMENT OF REGISTRATION AND EDUCATION OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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April 25, 1975.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner, The House of Vision, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered on November 27, 1974.

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is reported only at 322 N. E. 2d 15. The opinion is printed in Appendix A hereto.

The opinion of the Appellate Court of Illinois, is printed at 306 N. E. 2d 697, 16 Ill. App. 3d 487. The opinion is printed in Appendix B hereto (p. A10).

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on November 27, 1974. Rehearing was denied on January 28, 1975. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1) Whether the holding of the Supreme Court of Illinois, that the fitting of contact lenses by an optician pursuant to a written prescription from an eye doctor specifying contact lenses constitutes the practice of optometry, deprives petitioner of a legitimate aspect of its business in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2) Whether the Illinois Optometric Practice Act as construed by the Supreme Court of Illinois is so vague as to its meaning and application as to violate due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES.

The following Constitutional provisions and statutes are involved:

United States Constitution, Amendment XIV, § 1.

Illinois Optometric Practice Act, Ill. Rev. Stat., 1966, Ch. 91, §§ 105.3-105.4.

Sales Act, Ill. Rev. Stat. 1971, Ch. 121½ § 341.

Each provision is set forth verbatim in Appendix C hereto (pp. A29-31).

STATEMENT OF THE CASE.

The House of Vision, Inc. (HOV) is a retail dispensing optical company which along with countless other ophthalmic dispensers in Illinois, has fit contact lenses and spectacle lenses pursuant to prescription on a daily basis for many years. HOV has pioneered in the development of contact lenses for more than forty years, although the popular use of contact lenses did not begin until the 1950's.

In 1965, plaintiff filed this suit to enjoin HOV from engaging in the business of fitting contact lenses pursuant to prescriptions written by optometrists and ophthalmologists. It was alleged that the performance of this function violated § 3 of the Illinois Optometric Practice Act (See Appendix C hereto). HOV denied that the fitting of contact lenses constituted the practice of optometry. HOV further asserted the affirmative defense that if the court should construe the fitting of contact lenses to be the practice of optometry, it would be deprived of its constitutional rights in violation of Section 1 of Amendment XIV to the Constitution of the United States.

In 1971, more than six years after the filing of the suit, this matter was tried. At the close of plaintiff's case, the court entered judgment in favor of HOV. It concluded:

> The acts and things done by the defendant in the fitting of contact lenses does (sic) not constitute the practice of optometry as defined in Section 3 of the Illinois Optometric Practice Act (Ch. 91 Ill. Rev. Stat. § 105.3).

On appeal, the Appellate Court of Illinois, First District, affirmed the judgment of the trial court (See Appendix B).

Neither the trial court nor the Appellate Court had occasion to reach the constitutional issues raised by HOV since both courts construed the act in a manner which did not give rise to

a constitutional infirmity. Nevertheless, HOV continually asserted that its right to engage in a lawful business could not be infringed absent a clearly expressed act of the legislature. The Supreme Court of Illinois, however, reversed both the trial court and Appellate Court. Relying upon two opinions by the Illinois Attorney General, the Supreme Court held that the fitting of contact lenses constituted the adaptation of lenses within the meaning of the Illinois Optometric Practice Act (See Appendix A). In its Petition for Rehearing HOV pointed out the constitutional infirmities which arose as a result of the Illinois Supreme Court's opinion. The Petition for Rehearing was denied.

The opinions of the Appellate Court and the Illinois Supreme Court set forth the nature of HOV's activities in fitting contact lenses. HOV does not examine or refract eyes, nor does it select contact lenses as a manner of correcting defects in vision. The eye doctor, whether he be an optometrist or ophthalmologist, performs these functions. In all instances, HOV fits contact lenses only pursuant to the written authorization of the eye doctor, and the customer is directed to return to the eye doctor for evaluation not only of vision but also of proper fit of the lenses. No instance of injury to the eye as a result of the activity of HOV was introduced at the trial of this matter despite the fact that more than six years elapsed between the filing of the suit and the trial.

REASONS FOR GRANTING THE WRIT.

I.

THE ILLINOIS OPTOMETRIC PRACTICE ACT AS INTERPRETED BY THE ILLINOIS SUPREME COURT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION PROVIDED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner recognizes that this Court is confronted during each term with a multitude of petitions alleging violations of the due process and equal protection guarantees of the Fourteenth Amendment. Petitioner is also cognizant of the fact that this Court has in recent years declined to review the actions of state courts in interpreting state statutes enacted pursuant to the police power of the state, unless the state statute as interpreted by the state court comes in direct conflict with a specific guarantee such as freedom of speech or press. Petitioner nevertheless urgently asserts the necessity for a Writ of Certiorari to issue in this matter. The effect of the decision of the Illinois Supreme Court has been to deprive HOV and numerous others similarly situated of their right to engage in their legitimate occupation without affording due process of law.

Ever since the development of contact lenses, HOV through its skilled employees has been fitting contact lenses to customers pursuant to the prescription of an optometrist or ophthalmologist specifying contact lenses. This activity has been conducted in accordance with the traditional function of the optician in fitting spectacle lenses—a function which the Supreme Court of Illinois has recognized as being a legitimate activity outside the scope of the practice of optometry. See *Roberts Opt. Co.* v. *Dept. of Registration*, 4 Ill. 2d 290, 122 N. E. 2d 824 (1954);

Klein v. *Dept. of Registration,* 412 Ill. 75, 105 N. E. 2d 758, *cert. denied* 344 U. S. 855 (1952).

The right to engage in opticianry is most certainly a property right protected by the Fourteenth Amendment. This right, to be sure, is subject to the police power of the State to regulate a legitimate occupation when the public health, safety, and welfare so require. The right may not, however, be deprived unless the legislature expressly purports to do so and unless the statute which does no clearly sets forth the duty which is imposed upon the citizen so engaged, *Cramp* v. *Board of Education,* 368 U. S. 278 (1961); *Connally* v. *General Construction Co.,* 269 U. S. 385 (1926). It is this principle which the Illinois Supreme Court has transgressed.

Nowhere in the Optometric Practice Act is the fitting of contact lenses limited to the optometrist. Indeed, nowhere in the Optometric Practice Act does the term "contact lens" appear. The initial Optometric Practice Act was passed in 1919, long before the introduction of corneal contact lenses. The present Act, using much the same language as the 1919 Act, was passed in 1951, only four years after corneal contact lenses were first developed by an optician and only three years after they were first introduced in this country.

In the 1951 Act and in subsequent amendments, the legislature did not include within its terms a provision that contact lens fitting constitutes the practice of optometry, despite the fact that opticians have been doing this very act on a daily basis for many years. Moreover, the legislature in § 4 of the Optometric Practice Act and in § 341 of the Sales Act (1971 Ill. Rev. Stat., Ch. 121½) recognized the legitimate function of the optician in fitting lenses, making direct reference in the latter Act to the "furnishing" and "fitting" of contact lenses in such a manner that its terms can only be construed to contemplate the fitting of contact lenses by persons other than optometrists (See Appendix C, hereto).

Despite this historical and legislative framework, the Illinois Supreme Court has construed the Optometric Practice Act to deprive defendant of a lawful aspect of its business—a business in the development of which defendant has pioneered. To support its decision the Supreme Court relies almost entirely on two isolated opinions by the Illinois Attorney General which were not followed by the agency in charge of enforcement of the Act. The net effect of the Supreme Court action is to regulate a function not previously regulated in Illinois and not specifically prohibited by statute. It amounts to a judicial usurpation of the legislative function without the usual substantive and procedural safeguards surrounding legislative action regulating a property right.

In *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483 (1955), this Court considered a challenge to legislation which regulated the function of the optician. In its opinion this Court declared it is for the legislature, not the courts, to balance the advantages and disadvantages of new regulatory requirements, 348 U. S. at 487. For the court below to usurp that legislative function as it has done here constitutes the most basic infringement upon the guarantee of due process and deprives many skilled workers of their livelihood.

Just as a violation of defendant's rights to due process of law has occurred as a result of the Illinois Supreme Court's decision, so has its right to equal protection under the laws been violated. The decision necessarily rests upon a distinction between contact lenses and other ophthalmic lenses for which no statutory justification can be found and for which there is no basis in fact. This difficulty is apparent in the court's opinion, which incorrectly attempts to draw a distinction between the fitting of spectacle lenses and the fitting of contact lenses. No such distinction is drawn in the Optometric Practice Act. To distinguish between the optician who fits contact lenses and the optician who fits other ophthalmic lenses creates an arbitrary and unreasonable classification and results in an invidious discriminating prohibited by the equal protection clause of the United States Constitution.

II.

THE ILLINOIS OPTOMETRIC PRACTICE ACT AS CONSTRUED BY THE SUPREME COURT OF ILLINOIS IS SO VAGUE AS TO ITS MEANING AND APPLICATION AS TO VIOLATE DUE PROCESS OF LAW.

This Court has repeatedly stated that:

> [A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law" *Baggett* v. *Bullitt*, 377 U. S. 360, 367 (1964)

The Illinois Optometric Practice Act, as interpreted by the Illinois Supreme Court, fails to inform men of common intelligence as to the activity proscribed by the Act. The key word in the Court's holding is "adapting". The word "adapt" taken by itself is sufficiently broad to comprehend acts ranging from the most complex and sophisticated to the trivial and picayune. In the context used in § 3 of the Act, that word apparently refers to the judgmental act of the optometrist in selecting a remedy to correct a defect in vision, since the first sentence of § 3 refers to "adapting lenses or prisms, ocular exercises, visual training or any other method . . . for the aid [of vision]." This judgmental act of selection of a remedy naturally follows the other two elements of the definition of optometry: (1) examination and diagnosis and (2) measurement of vision. These three elements are all qualitative equivalents in terms of the exercise of quasi-medical judgment. The Illinois Supreme Court seems to have so interpreted the functions of the optometrist as far back as 1917. In *People* v. *Griffith*, 280 Ill. 18, 23, 117 N. E. 195 (1917), the Court expressed its uncertainty as to what is understood by the practice of optometry, but found that it may be within the power of the legislature to regulate:

> "the calling or profession of examining the eye to ascertain if there are defects which can be remedied by the use of

> lenses, the determination of the accommodative and refractive states of the eye, the range and power of vision and abnormal conditions and the adaptation of lenses to correct defects . . ."

The opinion of the court below has now extended the "calling or profession" of optometry to the fitting of contact lenses based on an arbitrary application of the word "adapting" to that function with no reasonable relation to the Optometric Practice Act itself or the historic function of the optometrist. The holding leaves anyone who studies the act without guidelines upon which to know whether his conduct will be proscribed. In so doing, it renders the act vague beyond constitutionally permissible limits.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 25, 1975.

APPENDIX A.

OPINION

SUPREME COURT OF ILLINOIS
United States of America

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of November in the year of our Lord, one thousand nine hundred and seventy-four, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN
WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MILEY, *Marshal*

Attest: JUSTIN TAFT, *Clerk*

Be It Remembered, that afterwards, to-wit, on the 27th day of November, 1974 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

PEOPLE EX REL. JOHN C. WATSON,
Appellant,

No. 46515 *vs.*

THE HOUSE OF VISION, INC., an Illinois corporation,
Appellee.

Appeal from Appellate Court First District.

Docket No. 46515—Agenda 48—September, 1974.

THE PEOPLE *ex rel.* JOHN C. WATSON, Director of Registration and Education, *Appellant* v. HOUSE OF VISION, *Appellee.*

MR. JUSTICE SCHAEFER delivered the opinion of the court:

On July 6, 1965, the People, on the relation of John C. Watson, Director of the Department of Registration and Education, filed a complaint in the circuit court of Cook County seeking to enjoin the defendant, House of Vision, Inc., a large optical dispensing company, from continuing its practice of allowing employees not licensed as optometrists to fit customers with contact lenses. The plaintiff contended that the acts involved in such fitting constituted the practice of optometry within the meaning of section 3 of the Illinois Optometric Practice Act (Ill. Rev. Stat. 1965, ch. 91, par. 105.3).

Over six years later, in October of 1971, the case was finally tried. At the close of the plaintiff's case, the trial judge concluded, as a matter of law, that the acts performed by the defendant did not constitute the practice of optometry. He therefore granted the defendant's motion for judgment in its favor and dismissed the complaint. The Appellate Court, First Dis-

trict, affirmed (16 Ill. App. 3d 487), and we granted leave to appeal.

Section 3 of the Act provides:

> "The practice of optometry is defined to be the employment of objective or subjective means, or both, for the examination of the human eye and its appendages, without the use of drugs, medicine, or surgery, for the purpose of ascertaining any departure from the normal, measuring its powers of vision, and adapting lenses or prisms, ocular exercises, visual training, or any other method other than the use of drugs, medicine, or surgery, for the aid thereof. A person shall be deemed to be practicing optometry within the meaning of this Act who in any way advertises himself to be an optometrist, or who shall employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof, or who shall practice or offer or attempt to practice optometry, as herein defined, either on his own behalf or as the employee of a person, firm, or corporation, whether under the supervision of his employer or not, or who shall use testing appliances for the purpose of measurement of the powers of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye or prescribe lenses, prisms, or ocular exercise for the correction or relief thereof, or who holds himself out as qualified to practice optometry. Nothing in this section shall be interpreted to prevent a person from acting as an assistant under the direct supervision of a person licensed by the State of Illinois to practice optometry or medicine and surgery, or to prohibit visual screening programs conducted by charitable organizations acting in the public welfare under the supervision of a committee composed of persons licensed by the State of Illinois to practice optometry and persons licensed by the State of Illinois to practice medicine and surgery." Ill. Rev. Stat. 1965, ch. 91, par. 105.3.

Simply described, the procedures followed by the defendant's employees with respect to contact lenses are as follows:

The customer brings in a normal spectacle prescription from an opthalmologist or optometrist on which the prescribing

doctor has noted that it is "O. K." to fit the patient with contact lenses. The spectacle prescription contains the refractive (*i.e.*, corrective) power of the lens for each eye, and sometimes also the vertex distance (*i.e.*, distance of the spectacle lens from the eyeball). These prescriptions are not sufficient by themselves to fabricate a contact lens. They give no indication of the shape of the wearer's cornea, on which the contact lens must fit. This determination is made by the defendant's employee.

The first step in this procedure is the measuring of the approximate spherical curvature of the wearer's cornea. This is done by using an optical analytical device known as a keratometer. Because the keratometer is incapable of measuring an irregular cornea, this process is only the starting point for a fitting. Three keratometer readings are taken and averaged together, after which the fitter uses a chart to translate the result into a specific lens shape. He then selects a trial lens of this shape and places it on the wearer's cornea.

A contact lens, when properly fitted, is designed to rest on the tear layer covering the eye and on the outer layer of the cornea, which is called the epithelium. The epithelium is a tissue which acts as a protective covering for the cornea. To maintain its normal structure, function, and metabolism, the epithelial tissue requires a constant supply of oxygen. Normally, the cornea receives oxygen directly from the air through diffusion by the tear layer. But since a "hard" contact lens is not permeable, it must be designed to permit adequate tear flow underneath it in order to supply the epithelial cells it covers with oxygen. If it does not do so, these cells will be altered or die.

To determine proper tear flow, the fitter places a clear, nontoxic chemical, fluorescein, in the wearer's eye. He then examines the part of the eye covered by the contact lens with a magnifier equipped with an ultraviolet light which causes the fluorescein to glow green. By observing the depth of the fluorescein color the fitter determines whether there is proper

tear flow behind the lens and what its rate of circulation is. He also determines whether any part of the trial lens is too tight or too loose on the cornea. There is no machine or chart to aid the fitter in reading these fluorescein patterns, which may be misinterpreted for a number of reasons. This is a skill which is acquired through training and experience.

Based upon his evaluation of the fluorescein patterns, the fitter may then select a trial lens of a different size and repeat the process. When he has finally determined a lens of the proper curvature to fit the cornea, he fills in an order form supplied by the manufacturer of the contact lenses. On this form the fitter writes in the spectacle prescription supplied by the prescribing doctor and, if indicated, the vertex distance. He then uses a transposition chart to convert these figures into an "adjusted" prescription, after which he notes the curve of the trial lens finally selected. The trial lens curve and the adjusted spectacle prescription are then converted by means of an arithmetic computation to the final power of the contact lens. The fitter may vary this power to a small degree to compensate for the refractive effects of the tear layer underneath the lens, as observed through the fluorescein patterns.

After the lenses have been manufactured, the customer returns to have the finished lenses fitted to him. At this time the fitter repeats his fluorescein pattern test and, if it appears satisfactory, gives the customer a wearing schedule. Two weeks later the customer returns and is questioned by the fitter regarding his reaction to the lenses. Complaints by the customer may include such things as a burning sensation from the lenses, sensitivity to light, pain, blurred vision, foggy vision, inability to read, and other matters. These comments aid the fitter in determining whether the lenses should be redesigned or whether the customer simply has not worn them properly. After the customer's subjective comments have been elicited, the fitter makes an objective examination of the cornea, both with and without fluorescein, to determine the fit and to check for any pathologi-

cal conditions such as scratches, staining, stripping, or swelling which would indicate faulty lens design. After this examination, the customer is advised to make an appointment with his eye doctor within the following two or three weeks. This medical checkup will, therefore, normally only occur after the customer has been wearing his lenses for several weeks, unless the fitter notices damage to the eye at the first examination and refers the customer immediately to an eye doctor for treatment.

The plaintiff contends that these procedures, when viewed in their entirety, amount to the "adaptation" of lenses for the aid of the powers of vision. The defendant attempts to make a detailed semantic and logical rebuttal of such an interpretation. Neither party, however, mentions what we consider to be a significant indication of legislative intent, *viz*, the 1946 Attorney General's opinion regarding the applicability of the almost identical language of the 1945 Optometric Practice Act to the fitting of contact lenses. This opinion was issued to the Director of the Department of Registration and Education and was published (1946 Ill. Att'y Gen. Rep. No. 427, at 165). It concluded that the fitting of contact lenses was within the language of the Act.

The 1945 Optometric Practice Act had language very close to that of the present act. It read, in pertinent part:

> "Any one of any combination of the following practices constitutes the practice of optometry:
>
> * * * * *
>
> (b) The prescription *or adaptation;* of lenses * * * to correct or alleviate defects or abnormal conditions of the human eye * * *." Ill. Rev. Stat. 1945, ch. 91, par. 91. (Emphasis added.)

While the present act does not have an introductory statement indicating the disjunctive nature of the practices that it describes, it does state those practices disjunctively, and the effect is the same. We see no reason to ignore the plain meaning of the language in order to read this provision partially in

the conjunctive as did the appellate court. We hold that the "adaptation of lenses or prisms for the aid [of the powers of vision]," by itself, is sufficient to constitute the practice of optometry.

The 1946 opinion of the Attorney General dealt with the fitting of scleral contact lenses. The instant case involves the fitting of corneal contact lenses. The scleral lens, which rests on the white part (sclera) of the eyeball and covers the cornea without touching it, is fitted in a slightly different manner from the corneal lens.

A scleral lens is fitted by first taking an impression mold of the wearer's eyeball. After the necessary refractive qualities are ground into this lens, it is fitted to the wearer's eyeball and any corrections necessary to secure a proper fit are made. Although the corneal lens is fitted without the taking of impression molds, its fitting procedure resembles the latter stages of a scleral lens fitting.

The 1946 opinion did, however, address itself specifically to these latter stages of scleral lens fitting:

> "In view of the foregoing provisions [of the Optometric practice Act], it is my opinion that the activities you describe in so far as they include examination of the eye to ascertain the presence of defects or abnormal conditions which may be corrected by the use of contact lenses; the taking of an impression mold of the eyeball from which a contact lens is to be cast; the determination of the corrective qualities to be incorporated in the lens by grinding, shaping or other means to develop the proper refractive qualities, whether done to correct or alleviate defects or abnormalities of the eye or to adjust it to the conditions of a specific occupation or environment; *or the adjustment or fitting of the lens to the eye, constitute the practice of optometry.*" (Emphasis added.) 1946 Ill. Att'y Gen. Rep. No. 427, at 167.

In 1951 the General Assembly repealed the 1945 act and enacted the present statute. At that time corneal contact lenses

had been in existence for four years. Nevertheless, the language of the 1945 act was, in essence, incorporated into the 1951 act and no specific exemption was provided for the fitting of contact lenses.

In 1962 the Attorney General issued another opinion which reiterated his 1946 interpretation and made it specifically applicable to the language of the 1951 act. (1962 Ill. Att'y Gen. Rep. No. 751, at 534.) The General Assembly has taken no action to alter this language or to make it inapplicable to the fitting of contact lenses. A consistent construction of this act has thus been acquiesced in by the legislature for over 28 years. A reasonable construction of an ambiguous statute by the governmental officers of departments charged with its enforcement, if contemporaneous, consistent long-continued, and in concurrence with legislative acquiescence, creates a presumption of correctness which is only slightly less persuasive than a judicial construction of the same act. *Fried* v. *Danaher* (1970), 46 Ill. 2d 475, *appeal dismissed*, 402 U. S. 902, 28 L. Ed 2d 643, 91 S. Ct. 1382; *McNely* v. *Board of Education* (1956), 9 Ill. 2d 143; *People ex rel. Spiegel* v. *Lyons* (1953), 1 Ill. 2d 409; *Cory Corporation* v. *Sauber* (1960), 363 U. S. 709, 4 L. Ed. 2d 1508, 80 S. Ct. 1331.

The phrase "adaptation of lenses" does not refer to the fitting of spectacle frames containing prescription lenses to the face and head of the wearer. In such cases all of the lens curvatures have been previously formulated by an optometrist or opthalmologist specifically to aid the vision of the person involved, and the optician's job is to position the lenses correctly in front of the wearer's eyes. He does not make any determinations regarding the curvatures of the lenses.

The fitting of contact lenses, on the other hand, requires the optician to determine some of the curvatures of the lenses themselves in order to properly fit them to the wearer's eye. Thus, his efforts are directed at making the lenses suitable for the eye,

rather than making the frames suitable for the face. In doing this the optician uses procedures that require him to come into actual contact with the customer's eyeball.

In our opinion the construction given to the word "adaptation" by the Attorney General was correct. Courts of other jurisdictions have given the same construction to similar statutes. See, *State ex rel. Danforth* v. *Dale Curteman, Inc.* (Mo. 1972), 480 S. W. 2d 848; *State ex rel. Reed* v. *Kuzirian* (1961), 228 Ore. 619, 365 P. 2d 1046, 88 A. L. R. 2d 1284; *Pennsylvania Optometric Association, Inc.* v. *DiGiovanni* (C. P. Phila. County 1968), 45 Pa. D. & C. 2d 245; *Fields* v. *District of Columbia* (D. C. Ct. App. 1967), 232 A. 2d 300; *Florida Association of Dispensing Opticians* v. *Florida State Board of Optometry* (Fla. 1970), 238 So. 2d 839; *contra, State ex rel. Londerholm* v. *Doolin* (1972), 209 Kan. 244, 497 P. 2d 138; *High* v. *Ridgeway's Opticians* (1963), 258 N. C. 626, 129 S. E. 2d 301; *State Board of Optometry* v. *Chester* (1964), 251 Miss. 250, 169 So. 2d 468.

The judgments of the circuit and appellate courts are reversed, and the cause is remanded to the circuit court of Cook County for further proceedings consonant with this opinion.

Reversed and remanded, with directions.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

APPENDIX B.

No. 57038

IN THE APPELLATE COURT OF ILLINOIS

First Judicial District

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN C. WATSON, Director of Department of Registration and Education of the State of Illinois, *Plaintiff-Appellant,*	Appeal from the Circuit Court of Cook County.
vs.	Honorable Walter P. Dahl, Presiding.
HOUSE OF VISION, an Illinois corporation, *Defendant-Appellee.*	

MR. JUSTICE SULLIVAN delivered the opinion of the court:

This is an appeal from a judgment in favor of defendant at the close of the plaintiff's case. The action was brought on the relation of the Director of the Department of Registration and Education pursuant to section 24 of the Illinois Optometric Practice Act (hereinafter Act), Ill. Rev. Stat. 1966, ch.91, par. 105.24, alleging in substance, that defendant was violating the strictures of the Act by the unlawful practice of optometry, insofar as it engaged in the practice of contact lens fitting. To that end, plaintiff sought "to enjoin any such person, firm or corporation from practicing optometry or from such act or acts in violation of the provisions of this Act."[1]

Plaintiff, in its complaint, asserted that defendant's conduct, in the fitting of contact lenses, was within the purview of the

1. Ill. Rev. Stat. 1966, ch. 91, § 105.24.

Act.[2] Specifically, it was charged that defendant, by its unlicensed employees, fitted contact lenses to, among others, an investigator of the Department of Registration and Education who gave to defendant a prescription for lenses from an optometrist, and that such fitting involved the exercise of professional skill and judgment as contemplated by the Act. An amended complaint alleged that the acts of defendant were encompassed by the wording of the Act: *vis;* it engaged in the measuring of the powers of vision; it fitted contact lenses for the purpose of adapting contact lenses for the eye; and did the above without the direct supervision of a licensed optometrist. Moreover, the amended complaint also alleged defendant exercised professional judgment, both subjective and objective, in making a number

2. Ill. Rev. Stat. 1966, ch. 91, § 105.3:

"The practice of optometry is defined to be the employment of objective or subjective means, or both, for the examination of the human eye and its appendages, without the use of drugs, medicine, or surgery, for the purpose of ascertaining any departure from the normal, measuring its powers of vision, and adapting lenses or prisms, ocular exercises, visual training, or any other method other than the use of drugs, medicine, or surgery, for the aid thereof. A person shall be deemed to be practicing optometry within the meaning of this Act who in any way advertises himself to be an optometrist, or who shall employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof, or who shall practice or offer or attempt to practice optometry, as herein defined, either on his own behalf or as the employee of a person, firm, or corporation, whether under the supervision of his employer or not, or who shall use testing appliances for the purpose of measurement of the powers of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye or prescribe lenses, prisms, or ocular exercise for the correction or relief thereof, or who holds himself out as qualified to practice optometry. Nothing in this section shall be interpreted to prevent a person from acting as an assistant under the direct supervision of a person licensed by the State of Illinois to practice optometry or medicine and surgery, or to prohibit visual screening programs conducted by charitable organizations acting in the public welfare under the supervision of a committee composed of persons licensed by the State of Illinois to practice medicine and surgery."

of physical determinations in regard to the contact lenses.[3] Defendant admitted fitting the contact lenses but denied that its contact in this regard was within the contemplation of the Act or in contravention thereof. Rather, defendant answered, it performed the mechanical function of fitting contact lenses by trained personnel consistent with and only after a prescription of an optometrist or opthalmologist for lenses is given to defendant by the customer.

Plaintiff, in its case in chief, called three witnesses: John Webster and Joseph Gulino, employees of the defendant, who testified to the procedures undertaken by defendant in the fitting process, and Dr. Kenneth Polse, an Alabama optometrist, testified, as an expert witness for the State, to the optometric implications of the contact lens fitting process. From their testimony, plaintiff argues that defendant's conduct fell within the ambit of the Act and, therefore, constituted the practice of optometry without a certificate of registration (Ill. Rev. Stat. 1966, ch.91, par. 105.1).

On appeal plaintiff contends that the testimony was sufficient to establish a *prima facie* case of statutory violation, and that the motion for judgment at the end of its case should have been denied. Defendant, conversely, seeks an affirmance of the trial court's ruling, which found:

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3. "a) Determined the base curve or the inside central curvature of contact lenses * * *.
b) Determined the peripheral curve radius of the contact lenses * * *.
c) Determined the peripheral curve width of the contact lenses * * *.
d) Determined the optical zone width or the diameter of the central optical zone of the contact lenses * * *.
e) Determined the refractive power of the contact lenses * * *.
f) Determined the central thickness of the contact lenses * * *.
g) Determined the edge thickness and edge design of the contact lenses * * *.
h) Determined the total diameter of the contact lenses * * *."

"That the acts and things done by defendant in the fitting of contact lenses does not constitute the practice of optometry as defined in Section 3 of the Illinois Optometric Practice Act * * *."

Without engaging in a lengthy recital of defendant's procedures we note from the testimony that the following transactional setting occurs in the fitting process. Initially, a keratometer[4] reading is taken of the customer's eye and trial lenses are inserted in accordance with fitting charts utilized by defendant. After insertion of the lenses, the fitter uses fluorescein[5] and a Burton Lamp[6] to evaluate tear circulation behind the lens. After this procedure, the fitter writes an order necessary for fabrication of the lenses. In regard to initial visitations (not defendant's specifiically), plaintiff's expert testified that a keratometer reading was incapable of measuring an irregular cornea[7] and that the optician decides whether the signs he views are regular or irregular. Moreover, the expert also testified that fluorescein patterns are subject to misinterpretation and, although charts are available, the various lens curves determined by the fitter's judgment may not be accurate.

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4. An instrument used to measure the curvature of a sphere. Herein, used for measuring the curvature of the anterior surface of the cornea. Grosvenor, Contact Lens Theory and Practice (The Professional Press, Inc., 1963).

5. A chemical dye which stains the tear fluid when instilled in the eye and the pattern observed with black light or the slit lamp of the biomicroscope, * * * the fluorescein glows as the radiation excites it and that the brilliance is proportional to the depth of the retro-lens tear layer in which the florescein is dissolved. The fitter then interprets what he sees according to his skill and knowledge * * *. Lester, Robert, The Fluorogram, 46 Am. J. of Optometry, 221 (1969).

6. A specialized lamp containing a magnifier, having both white and ultraviolet light tubes which enables the fitter to examine the eye, the tear layer, tear flow, lens movement, and how the lens is positioning under magnification.

7. e.g., where person has had a cataract operation; is suffering from keratoconus or irregular astigmatism.

Secondly, upon delivery of the finished lenses, the customer is instructed on how to insert them, and is once again viewed with florescein and the Burton Lamp to determine fit. Based on this, necessary adjustments of the lenses are made and the customer is then given a wearing schedule. Polse testified that the power of the finished lens may not be accurate and in order to obtain the proper ultimate power, a refraction through a trial lens should be performed. There is no testimony that any refraction is done by defendant.

Thirdly, successive check-up visits are followed, whereby the fitter may determine lens fit, as well as elicit customer complaints, in order to compensate for improper lens design or shape. In addition, the fitter checks for staining[8] or other corneal changes[9] and takes additional keratometer readings. Based upon the above, the fitter determines whether any adjustments are necessary. Succeeding visits engender the same purpose. Polse testified that the purpose of the follow-up visits during the "adaptive period" are to evaluate the effect the lens has on the cornea. In addition, he testified that through customer response, the fitter can make judgments as to possible causes of the responsive symptoms.

Inasmuch as plaintiff has attempted to categorize defendant's acts as those expressly delineated by the Act, it is necessary to set out the relevant arguments and the purportedly controlling statutory language.

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8. When epithelial tissue is either altered or actually destroyed, causing voids in the epithelium.

9. Edema (swelling caused by an increase of water in the cornea); Scarring (alteration in normal composition of the epithelial tissue occurring when the epithelial cells are subject to prolonged irritation causing scar tissue to form).

I

Plaintiff initially contends that defendant "adapts" lenses within the meaning of the Act.[10] It asserts:

> [A]s a result of his examination and observations, the technician in the exercise of his judgment determines whether to modify the lenses and the extent to which modifications and adjustments should be made. In other words, the technician *adapts* the lenses better to conform to the customer's eye and to preserve normal metabolic process." (Emphasis added.)

In support of this proposition, the State relies heavily on *State ex inf. Danforth* v. *Dale Curteman, Inc.*, 480 S. W. 2d 848 (Mo. 1972), wherein the court found defendant's admission of "fitting" lenses to be synonymous with "adaption", within the meaning of the Missouri Act.[11] In *Curteman*, the court stated at page 856:

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10. Ill. Rev. Stat. 1966, ch. 91, § 105.3:

> "The practice of optometry is defined to be the employment of objective or subjective means, or both, for the examination of the human eye and its appendages, without the use of drugs, medicine, or surgery, for the purpose of ascertaining any departure from the normal, measuring its powers of vision, and adapting lenses or prisms, ocular exercises, visual training, or any other method other than the use of drugs, medicine, or surgery, for the aid thereof."

11. Missouri—V.A.M.S. § 336.010: Defining practice of optometry.

> "Any one of any combination of the following practices constitutes the practice of optometry:
>
> (1) The examination of the human eye, without the use of drugs, medicines or surgery, to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms or ocular exercises.
>
> (2) The employment of objective or subjective mechanical means to determine the accommodative or refractive states of the human eye or the range of power of vision of the human eye.
>
> (3) The prescription of adaptation without the use of drugs, medicines or surgery, of lenses, prisms, or ocular exercises to correct defects or abnormal conditions of the human eye or to adjust the human eye to the conditions of special occupation * * *."

"It is equally plain that Curteman engaged and engages in '[t]he * * * adaptation * * * of lenses * * * to correct defects or abnormal conditions of the human eye.' To 'adapt' means 'to make suitable or fit (as for a particular use, purpose, or situation) * * * to make suitable (for a new or different use or situation) by means of changes or modifications.' Webster's New International Dictionary, Third Edition. 'Adaptation' is 'the act or process of adapting, fitting or modifying' or 'adjustment to environmental conditions.' Idem. *Adaptation is synonymous with fitting.* The adaptation of contact lenses by one prescribing such lenses is the activity or process by which such lenses are fitted to the eyes of the individual. It includes all of the actions taken by Curteman in measuring and examining the eye of the patient, the insertion of the flourescein dye, the placing of the lenses on the cornea, the giving of a wearing schedule, the examination of the patient and the eye after trial use of the lenses, and the making of any necessary modifications in the lenses to insure a proper fit. Curteman makes contact lenses suitable to patients; fits and adjusts them to the human eye; alters, changes the form and structure and modifies contact lenses to fit the needs of the patient. Dale Curteman conceded that his corporation is engaged in adapting contact lenses, in the following exchange: 'Q. And would you state what business Dale Curteman, Inc. is engaged in? A The fitting upon medical referral from medical doctors, of contact lens, artificial eyes and prosthetic appliances.' Under Dale Curteman's own admission and under the plain and unambiguous language of the subsection Curteman is engaged in the adaptation of contact lenses to correct defects or abnormal conditions of the human eye.

As we construe Chapter 336 and its several provisions the circuit court erred in concluding as a matter of law that the activities and practices of Curteman do not constitute the practice of optometry in violation of Chapter 336."

Defendant, conversely, argues that the proper interpretation of the word "adapt" is to be found in *State ex rel. Londerholm* v. *Doolin*, 497 P. 2d 138, 151 (Ka. 1972)[12]:

> "Finally, plaintiffs contend that the defendants in the fitting process are 'adapting' lenses to the human eye. Plaintiffs argue that the three criteria of a good fit are: (1) That lenses provide good vision, (2) that they fit comfortably, and (3) that they cause no damage, and that defendants resolve at least two of the three. Defendants strive to provide lenses that fit comfortably and cause no damage. In one sense, this could be construed to mean 'adaptation' as used in the statute. The statute, however, is aimed at correcting 'defects or abnormal conditions' by use of lenses. The use of the word 'adaptation' must be construed in connection with the intent of the statute. In this light, 'adaptation' does not refer to the fitting process, but to the correction of refractive errors caused by 'defects or abnormal conditions.' These are the responsibility of the physician. The defendants do not 'adapt' the lenses by determining that certain optical qualities are needed to correct refractive error."

Moreover, defendant maintains that when the relevant portions of the Act are read in their entirety, the reference made by "adapt" is to a judgmental determination of the optometrist for a method or means of correcting a previously diagnosed

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12. Kansas—K.S.A. 65-1501 [L. 1923, ch. 220, § 1.] Practice of optometry defined.

The practice of optometry is defined as follows: The examination of the human eye without the use of drugs, medicines or surgery, to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms, or ocular exercises and their adaption for the aid thereof.

Kansas—K.S.A. 65-1502 [L. 1923, ch. 220, § 2.] Who deemed practitioners.

That any person shall be deemed to be practicing optometry within the meaning of this act, * * * who shall make in any manner a test or examination of the eye or eyes of another to ascertain the refractive muscular or pathological condition thereof; *third*, who shall in any manner adapt lenses to the human eye for any purpose, either directly or indirectly.

condition. We believe the word "adapt" must be construed in the context in which it appears in the Act and this is true even though the statutory definition of optometry is, to some extent, to be read in the disjunctive. It is our belief that a plain reading of the Act indicates that, after an examination for the purpose of ascertaining any departure from normal or measuring the powers of vision, the optometrist may recommend the adaption of lenses * * * or any other method, *for the aid thereof* (if a departure from normal is found or a relief for the power of vision is needed). Plaintiff stated in its brief:

> "While it is true that the eye doctor presumably conducts an examination and a refraction before writing the spectacle prescription delivered to defendant's fitters and has also presumably made a professional judgment that the patient is a suitable candidate for contact lenses, that is the extent of the eye doctor's involvement in the contact lens process."

We do not believe that the record establishes that defendant performs this function of recommending the adaption of lenses for the aid of any departure from normal found by defendant, rather, it appears that defendant is the conduit through which the necessary "aid" is rendered. To that end, the construction of "adaption" by the court in *Doolin* is more persuasive, although our determination herein is predicated upon our own understanding of the Act, as implemented by the evidence or lack thereof in the record. Accordingly, and consistent with the record, we cannot say that defendant "adapts" lenses as contemplated by the Act. Consistent with our understanding of the word "adapt", in its textual setting, is the Illinois Supreme Court's discussion in *People* v. *Griffith*, 280 Ill. 18, 23, 117 N. E. 195:

> "[T]o practice the calling or profession of examining the eye to ascertain if there are defects *which can be remedied by the use of lenses*, the determination of the accommodative and refractive states of the eye, the range and power of vision and abnormal conditions and the *adaption of lenses to correct defects* * * *." (Emphasis added.)

II

Secondly, plaintiff contends defendant, in the course of the fitting process, "measures powers of vision" by the use of objective and subjective examinations.[13] Plaintiff contends the following conduct constitutes a violation of the Act.

> "During the initial visit, before the fitter can decide whether to specify a special contact lens, such as a toric, bi-toric or lenticular lens, the technician must make objective examinations of the eye to determine whether the customer has corneal irregularities such as those found in persons having high corneal toricity or astigmatism or, in those persons who have had cataract surgery. In order to make this determination, the technician must evaluate the customer's vision as it is affected by the irregular condition and the contact lens' ultimate effect upon that condition. In other words, the technician must make a decision with respect to the customer's *powers of vision* from his observations and examinations and then exercise his judgment to select the appropriate special lens to correct the condition he observed."

Further, plaintiff argues that on successive visits the fitter deals with the customer's "visual problems" and makes both qualitative and quantitative measurements in the course thereof: "[A] change in corneal curvature or the presence of edema directly affects *powers of vision* and visual acuity." Plaintiff cites no case and introduced no medical testimony from which it could be determined that defendant's acts constitute the measurement of the powers of vision. Further, it appears that plaintiff avoids any discussion of the optometric function (refraction) as it applies to the aforementioned measurement, a function which is undertaken by the optometrist or opthamologist prior to the issuance of a corrective prescription and a function, in its totality, which, from the record, appears to be unconnected to defendant's conduct. As stated in *Doolin*, at page 151:

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13. Ill. Rev. Stat. 1966, ch. 91, § 105.3, See Footnote 10.

> "Refraction is solely determined by the physician in the prescription delivered to defendants. The prescription used by the defendants in ordering contact lenses does not determine refractive error in the eyes except as determined by physicians and as modified by the use of charts and formulae approved by the physicians for use by defendants."

Plaintiff, we feel, incorrectly construes "the evaluation of the customer's vision" or "visual problems" to be the measuring of the powers of vision. The former, perhaps the result of improper lens fit, should not be confused with a determination of whether lenses are actually needed. The use of the keratometer to determine the presence or absence of corneal distortion and edema, was explained in *High* v. *Ridgeway's Opticians*, 129 S. E. 2d 301, 304 (N. C. 1963):

> "A keratometer (or ophthalmometer) is a mechanical instrument or device used for measuring the curvature of the cornea of the human eye. As we interpret the evidence its use has no relation whatever to the methods used by medical doctors, oculists or optometrists in the measuring of the powers of vision. There is no evidence on the record tending to show that there is any other instrument, device, or method in general use that is better adapted for the purpose of obtaining the curvature of the cornea of the human eye, which information is necessary to properly fabricate a contact lens for the eye."

Finally, plaintiff's witness, Webster, testified that to the best of his knowledge defendant did not test visual acuity, vision, refract or make any determination of what the prescription should be.

(Up to this point we must note, parenthetically, that this court would be better advised as to the medical significance of defendant's acts if the plaintiff, in its case in chief, had introduced expert witnesses competent to answer hypothetical questions in this regard. Polse, being an Alabama optometrist, was found by the trial court to be incompetent to answer certain

questions, hypothetical in nature, put to him at the conclusion of his testimony, and the void left in the record by this testimony, weakens the position taken here by the plaintiff.)

III

Plaintiff next contends that defendant practices optometry because it prescribes lenses for the correction or relief of the human eye.[14] Specifically, it states:

> "The spectacle prescription received by Defendant does not describe or define any of the essential ingredients of a contact lens prescription. Defendant must supply every element but one of the specifications in order to enable a manufacturer to fabricate the lenses. Only the power of the spectacle lenses is provided by the eye doctor, but even that is changed by the technician. The power of the contact lenses are not normally the same as the power of the spectacle lenses because the power of the contact lenses is dependent on the base curves selected by the technician."

In support of its contention, plaintiff cites approvingly from *Curteman*, at pages 854, 855:

> "I. 'Prescription' of the lenses
>
> That Curteman engaged and engages in '[t]he prescription * * * of lenses * * * to correct defects and abnormal conditions of the human eye' is clear under all accepted definitions of the term 'prescription'. To 'prescribe' means 'to write or give medical prescriptions (for a patient) * * * to give advise in the manner of a doctor giving a medical prescription * * * to lay down authoritatively as a guide, direction, or rule of action: impose as a peremptory order: dictate, direct, ordain * * * to direct, designate, or order the use of as a remedy (the doctor *prescribed*

14. Ill. Rev. Stat. 1966, ch. 91, § 105.3:

"[W]ho shall use testing appliances for the purpose of measurement of the powers of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye or *prescribe* lenses, prisms, or ocular exercise for the correction or relief thereof, * * *."

quinine).' Webster's New International Dictionary, Third Edition. A prescription for a contact lens is a written direction for the preparation of such a lens to be fabricated in conformance with certain specifications calculated to meet the refractive needs of the human eye, and includes both the device and the instructions given by the prescriber as to the use of the device. Without doubt the form which Curteman prepares, issues and presents to the laboratory for fabrication of the contact lenses is a *prescription* within the wording of subsection (3). One basic factor contained in the prescription (the correction of the refractive error) is derived from a prescription issued by an ophthalmologist, but it is not possible to fabricate a contact lens from a prescription for ordinary spectacles. Ten other additional operations, measurements, judgments and decisions must necessarily be made by someone before the 'converted' prescription may be issued in form sufficient to enable a laboratory worker to fabricate the lens. Curteman performs these ten additional necessary operations, measurements, etc., determines and prescribes the final specifications, and issues the prescription used by the fabricator. Thereafter Curteman instructs the patient as to the use of the devices. Under the wording of subsection (3) as written, the only reasonable and realistic conclusion is that Curteman is engaging in the prescription of lenses to correct defects or abnormal conditions of the human eye.

It does not militate against this conclusion that one ingredient of the final prescription comes from a physician or that after Curteman performs these services to the best of Curteman's ability the result is subject to review and approval or disapproval by the physician, who inspects the lenses and reexamines the eyes of the patient. 'It is no defense that Reiss processed a doctor's prescription and that his work had been pronounced satisfactory by the ophthalmologist after a wearing time of three weeks. The crucial period requiring professional supervision was at the time of the adaptation of the lenses, their initial adjustments and the early stages of wearing.' New Jersey State Board of Optometrists v. Reiss (1963), 83 N. J. Super. 47, 198 A. 2d 816, 1, c. 822. 'Appellant's contention that he would have referred the patient back to the prescribing doctor

> does not excuse his practice of optometry at the time of fitting.' Fields v. District of Columbia (1967), D. C. Ct. App., 232 A. 2d 300, 1, c. 306."

We believe that the use of the word "prescribe" in the Act is to be denominated as the end result of the diagnostic function, performed by the optometrist or ophthalmologist. Defendant's conduct, in our view of the Act, is merely an implementation of the original prescription which resulted from a determination that, among other things, an ocular deficiency, deformity, visual or muscular anomaly existed. As defendant aptly points out, the prescribing eye doctor expects performance by the party to whom the prescription is taken and, in the case herein, defendant is obtaining physical specifications for lenses pursuant to the doctor's direction to do so. As hereinbefore noted in *Doolin:*

> "The prescription used by defendants in ordering contact lenses does not determine refractive error in the eyes except as determined by physicians and as modified by the use of charts and formulae approved by the physicians for use by the defendants."

The order for the fabrication of the lenses, which includes the additional parameters[15] determined by defendant, we believe,

15. a) The base curve (the central curve on the back surface of the contact lens).
    b) The optical zone diameter (part of the back surface of the lens over which the base curve maintains a constant curvature).
    c) The diameter of the contact lens.
    d) The secondary curve (the curve immediately adjacent to the base curve on the back surface of the lens).
    e) The peripheral curve (the outer curve of the lens immediately adjacent to the secondary curve).
    f) Central thickness (the distance between the front and back surfaces of the lens measured at its center).
    g) The power of the contact lens (a function of the thickness and the front and back surfaces of the lens).

(Footnote continued on next page)

from the evidence offered here, is not the type of "prescription" contemplated by the Act. It is our view that one must first undertake to diagnose some deficiency for which a correction is necessary. To take, as plaintiff does, the form used by defendant in the regular course of its business (designated "retail Rx blank") and argue that "Rx" is the medical abbreviation of the word "prescription", and therefore defendant prescribes lenses, strains a reasonable interpretation of the Act.

IV

Next, plaintiff contends that defendant examines, subjectively and objectively, the human eye for the purpose of determining departures from normal.[16] Defendant purportedly does the above when it determines the shape of the cornea by keratometer readings; in the decision whether to order special lenses; and by the elicitation of customer responses as to the comfort of lens fit. These "examinations", plaintiff asserts, are best exemplified when the fitter undertakes the examination of the eye to determine the presence of corneal staining, stippling, edema, and deformity in corneal curvature. To this point the court in *Doolin,* at page 151, responded:

> "Plaintiffs contend the defendants examine eyes for pathological conditions. This argument is based upon the use of the fluorescein pattern test. Although this test may result in disclosing pathological conditions of the eye, such as stippling, dimpling, or abrasion, the basic purpose of the test is to determine the fit, particularly, whether or not the contact lens is floating on the cornea or is touching the cornea. If, in the process of testing the fit by the use of this test, abnormal conditions are discovered, the patient is directed back to his physician. The pathological con-

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h) The transition zones or blends (treatment to these areas between the base and secondary curves).

i) The edge treatment (the shape, thickness and contour of the edge of the contact lens).

16. Ill. Rev. Stat. 1966, ch. 91, § 105.3, See Footnote 10.

ditions are the responsibility of the physician, not the defendants."

We believe the record lacks sufficient evidence to establish that defendant attempted to examine the human eye within the meaning of the Act. Moreover, it appears to us that the function of determining "departures from normal" is not, in light of the Act's wording, to be viewed as standing alone. The conjunction "and" (defined as "also", "in addition", "moreover", "as well as") which follows "departures from normal" indicates that once the examination is performed any necessary corrective or prescriptive action is then undertaken. Examination by the optometrist, in this context, is either for the purpose of acting upon the observation made or, if the optometrist is precluded from acting, referring the client to one who can. Should the observed "departure' be correctable by lenses, prisms, ocular exercises, visual training or other methods, the necessary prescription is made. If, on the other hand, the "departure" examination requires the use of drugs, medicine or surgery, the optometrist is proscribed from acting. It is clear to us that the above is not within the realm of defendant's operations. Defendant, necessarily, may view any departure from normal when it observes the relationship of the lens and the cornea. However, as we construe the Act, this is not the type of conduct contemplated as being within the practice of optometry. It appears to us that the "examinations" by defendant were not made for the purpose of determining departures from the normal, but for the purpose of ascertaining proper lens fit. The Act indicates the examination must be for one of two purposes; determining departures from normal and measuring powers of vision, neither of which defendant is engaged in.

Plaintiff asserts that there are differences in the Act herein and the statutory authority relied upon by the court in *Doolin:* in particular, the 'referral section" of the statute, K. S. A. 65-2871 [L. 1957, ch. 343, § 72], which is as follows:

> "The practice of the healing arts shall not be construed to include the following classes or persons.
>
> * * * * *
>
> (g) Persons whose profesisonal services are performed under the supervision or by order of or referral from a practitioner who is licensed under this act."

However, the basis for the court's decision in *Doolin* was predicated upon a finding, as a matter of law, that the acts of defendant did "not result in determining refractive error, or in examining eyes for pathological conditions, or in adapting lenses within the meaning of the Statutes of this state." Further, we find the *Doolin* decision persuasive only to the extent that it provides, as hereinbefore noted, more reasonable interpretations of comparable statutory language.

A later section of the Act seemingly particularizes the general language of the above "departure from normal" as follows:

> "A person shall be deemed to be practicing optometry within the meaning of this Act *** who shall *** diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye * * *."[17]

Plaintiff argues defendant engages in such conduct, while defendant contends that in ascertaining lens fit they may view certain corneal changes manifested as a result of improper fit. However, they undertake no diagnostic function. We conclude that this portion of the Act is a clarification and enumeration of "ascertaining any departure from normal" insofar as the specified pathological conditions mentioned constitute such departures. While specific statutory provisions are to control general provisions on the same subject, *People* v. *Cairo & Thebes R. Co.*, 364 Ill. 329, 333, 4 N. E. 2d 482, it appears that construction of the above portions of the Act should be governed by consistent interpretations. Therefore, the reasoning applied in our discussion of "departure from normal" applies

17. Ill. Rev. Stat. 1966, ch. 91, § 105.3.

with equal certaintude in this instance. Further, the above quoted passage is itself followed by:

> "[o]r prescribe lenses, prisms, or ocular exercise for the correction or relief thereof." (Emphasis added.)

We note for purposes of consistency, that the conjunction "or" should in fact be "and". As hereinbefore discussed, the import of the Act is to preclude the examination of the human eye for the purpose of ascertaining any departure from normal (diagnosing ocular deficiencies, etc.) and adapting (prescribing) lenses, etc. for the aid thereof. We are of the opinion that the use of the clause "for the correction and relief thereof" is significant and, if read as part of the disjunctive clause beginning with "or prescribe lenses, etc.", the necessary reference would have to go back to the "measuring of the powers of vision" and the "diagnosis of ocular deficiencies", etc. The use of "or" and "and" is so frequently inaccurate in statutory enactments that courts readily change "or" to "and" and vice versa, whenever such conversion is required by context. *Goldblatt* v. *City of Chicago*, 300 Ill. App. 2d 211, 217, 174 N. E. 2d 222. Moreover, the Act initially defines what acts, generally, constitute the practice of optometry ("The practice of optometry is * * *"); thereafter, the Act proscribes certain conduct, if engaged in, as within the broad definitional structure of the practice of optometry. Clearly, the definitional aspect and the proscriptive aspects are not mutually exclusive. Accordingly, we are not, from the record presented, persuaded by the contentions of plaintiff; in that we ascertain a difference between the diagnostic function asserted and the observation of adaptive symptoms made by defendant.

This court is aware of counterveiling positions taken on this matter by other jurisdictions. In fact, the optometric statutes of those states are essentially the same as the Illinois Act. Plaintiff cites many of these authorities in its brief and, while they are informative on the issue of what constitutes the practice

of optometry, they cannot be substituted for the lack of evidence offered at trial. In the absence of sufficient proof necessary to establish a *prima facie* case, we cannot tangentially use these authorities in order to support a position we might be drawn to, but which we believe was inadequately established. A finding of the trial court should not be set aside because this court feels that other conclusions might be more reasonable. *Henry* v. *Robert Kettell Const. Corp.*, 82 Ill. App. 2d 420, 226 N. E. 2d 89.

If in plaintiff's opinion the statutes are not as clear and as restrictive as public policy requires, remedial legislation should be sought.

We conclude, therefore, in light of the evidence offered here, that plaintiff failed to prove a violation of the Illinois Optometric Practice Act. Accordingly, we hold that the finding for defendant at the close of plaintiff's case was proper.

For the reasons stated the judgment is affirmed.

Affirmed.

DRUCKER, J., and LORENZ, J., concur.

APPENDIX C.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution amendment XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 3 of the Illinois Optometric Practice Act, Ill. Rev. Stat., 1966, Ch. 91, § 105.3:

> The practice of optometry is defined to be the employment of objective or subjective means, or both, for the examination of the human eye and its appendages, without the use of drugs, medicine, or surgery, for the purpose of ascertaining any departure from the normal, measuring its powers of vision, and adapting lenses or prisms, ocular exercises, visual training, or any other method other than the use of drugs, medicine, or surgery, for the aid thereof. A person shall be deemed to be practicing optometry within the meaning of this Act who in any way advertises himself to be an optometrist, or who shall employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof, or who shall practice or offer or attempt to practice optometry, as herein defined, either on his own behalf or as the employee of a person, firm, or corporation, whether under the supervision of his employer or not, or who shall use testing appliances for the purpose of measurement of the powers of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of

the human eye or prescribe lenses, prisms, or ocular exercise for the correction or relief thereof, or who holds himself out as qualified to practice optometry. Nothing in this section shall be interpreted to prevent a person from acting as an assistant under the direct supervision of a person licensed by the State of Illinois to practice optometry or medicine and surgery, or to prohibit visual screening programs conducted by charitable organizations acting in the public welfare under the supervision of a committee composed of persons licensed by the State of Illinois to practice optometry and persons licensed by the State of Illinois to practice medicine and surgery.

Section 4 of the Illinois Optometric Practice Act, Ill. Rev. Stat., 1966, Ch. 91, § 105.4:

Nothing contained in this Act shall be construed to apply to persons authorized under the laws of the State of Illinois to practice medicine and surgery, nor persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry. Nothing contained herein shall prevent any such person, firm or corporation from engaging the services of one or more registered optometrists nor prohibit any such registered optometrist when so engaged, to practice optometry as defined in Section 3 of this Act, when the person, or firm or corporation so conducts his or its business in a permanently established place and in such manner that his or its activities, in any department in which such registered optometrist is engaged, insofar as the practice of optometry is concerned, are in keeping with the limitations imposed upon individual practitioners of optometry by paragraphs (e), (f), (k), (l), (m), (n), (o), (p), (q), and (r) of Section 13 of this Act; provided, that such registered optometrist or optometrists shall not exempt, by reason of such relationship from compliance with the provisions of this Act as prescribed for individual practitioners of optometry.

Section 341 of the Sales Act, Ill. Rev. Stat. 1971, Ch. 121½ § 341:

No person, firm or corporation, in relation to the examination of the human eye, or the furnishing, prescribing or fitting of materials used in prescription eye glasses or contact lenses, may advertise directly or indirectly by any means, any price, cost, or free services or materials.